

**El Centro Community Mental Health Center and Social Services Union, Local 535, Service Employees International Union, AFL-CIO. Cases 21-CA-20008 and 21-CA-20608**

January 7, 1983

## DECISION AND ORDER

BY MEMBERS JENKINS, ZIMMERMAN, AND HUNTER

On September 28, 1982, Administrative Law Judge George Christensen issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order, as modified and set forth in full below.<sup>1</sup>

## ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, El Centro Community Mental Health Center, Los Angeles, California, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Conducting investigatory interviews concerning alleged misconduct of its employees from and

<sup>1</sup> The General Counsel, the sole party filing exceptions herein, has accepted only to the failure of the Administrative Law Judge to provide in his recommended Order that Respondent make whole the public information specialist for any losses suffered in wages and other contractual benefits, including the right to grieve his discharge, and that Respondent reimburse the Union for dues not deducted and remitted pursuant to the checkoff authorization of the public information specialist. To the extent explained below, we find merit in these exceptions.

The Administrative Law Judge ordered, and we agree, that Respondent must apply all the terms and conditions of the collective-bargaining agreement to Frank Sifuentes, the public information specialist. Although implicit in this provision is that Sifuentes be made whole for any loss in wages and benefits suffered, we will modify the recommended Order to explicitly provide for such remedy. However, as Sifuentes' discharge occurred after the conclusion of the hearing in this case, it is not before us and we will not attempt to remedy it. We emphasize that we are not finding that Sifuentes has no right to grieve his discharge, but merely that the issue is more properly left to a subsequent proceeding. Further, we agree with the General Counsel that Respondent must reimburse the Union for any loss of dues suffered as a result of its failure to honor Sifuentes' dues-checkoff authorization, and we will modify the recommended Order to provide for this reimbursement. See *J. F. Swick Insulation Co., Inc.*, 247 NLRB 626 (1980).

Moreover, as the Administrative Law Judge failed to provide for any injunctive language in his recommended Order, we shall further modify the recommended Order to include the narrow injunctive language, "in any like or related manner."

after the time any employee requests union representation, without the presence and participation of the requested representative.

(b) Unilaterally refusing to recognize Social Services Union, Local 535, Service Employees International Union, AFL-CIO, as the sole and exclusive bargaining representative of any employee classified as public information specialist, including Frank Sifuentes, without prior union notice, bargaining, and consent.

(c) Unilaterally refusing to apply all the terms and conditions of any collective-bargaining agreement between the Respondent and the Union including the dues-checkoff provision, to employees classified as public information specialists, including Frank Sifuentes, without prior union notice, bargaining, and consent.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed under Section 7 of the Act.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Apply all the terms and conditions of any collective-bargaining agreement between Respondent and the Union to employees classified as public information specialists, including Frank Sifuentes, until and unless Respondent has notified the Union of its desire to remove the classification and the employee(s) within that classification from the coverage of any agreement, the Union has had an opportunity to bargain concerning the terms for such removal, and consented thereto.

(b) Make whole any employees classified as public information specialists, including Frank Sifuentes, for any loss of wages and benefits, with interest on lost wages, they may have suffered, and the Union any loss of dues suffered, with interest thereon, as a result of Respondent's failure to comply with the collective-bargaining agreement between Respondent and the Union.<sup>2</sup>

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the backpay and benefits due under the terms of this Order.

(d) Post at its Los Angeles, California, facility copies of the attached notice marked "Appendix."<sup>3</sup>

<sup>2</sup> Interest on amounts due under this paragraph shall be computed in the manner prescribed in *Florida Steel Corporation*, 231 NLRB 651 (1977). See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716, 717-721 (1962).

<sup>3</sup> In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by

*Continued*

Copies of said notice, on forms provided by the Regional Director for Region 21, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 21, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

## APPENDIX

### NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

The Act gives employees the following rights:

- To engage in self-organization
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To engage in activities together for the purpose of collective bargaining or other mutual aid or protection
- To refrain from the exercise of any or all such activities.

Accordingly, we give you these assurances:

WE WILL NOT conduct investigatory interviews concerning alleged misconduct of any employee from and after the time the employee requests union representation, without the presence and participation of the requested representative.

WE WILL NOT unilaterally refuse to recognize Social Services Union, Local 535, Service Employees International Union, AFL-CIO, as the sole and exclusive bargaining representative of any employee classified as public information specialist, including Frank Sifuentes,

without prior union notice, bargaining, and consent.

WE WILL NOT unilaterally refuse to apply all the terms and conditions of our collective-bargaining agreement with the Union, including the dues-checkoff provision, to employees classified as public information specialists, including Frank Sifuentes, without prior union notice, bargaining, and consent.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed under Section 7 of the Act.

WE WILL apply all the terms and conditions of our collective-bargaining agreement with the Union to employees classified as public information specialists, including Frank Sifuentes, until and unless we notify the Union of our desire to remove the classification and the employee(s) within that classification from the coverage of the agreement, the Union has had an opportunity to bargain concerning the terms for such removal, and consented thereto.

WE WILL make whole any employees classified as public information specialists, including Frank Sifuentes, for any loss of wages and benefits they may have suffered, and the Union for any loss of dues suffered, with interest, by reason of our failure to comply with our collective-bargaining agreement with the Union.

### EL CENTRO COMMUNITY MENTAL HEALTH CENTER

## DECISION

### STATEMENT OF THE CASE

GEORGE CHRISTENSEN, Administrative Law Judge: On February 2, 1982, I conducted a hearing at Los Angeles, California, to try issues raised by a complaint issued on October 20, 1981,<sup>1</sup> consolidating alleged unfair labor practices set out in charges filed by the Union on February 13 and September 1.

The consolidated complaint alleges the Center violated Section 8(a)(1) of the National Labor Relations Act, as amended, by a February refusal to honor an employee's request for union representation during an interview conducted by a company supervisor which the employee reasonably believed could or would result in disciplinary action against her. The consolidated complaint also alleges the Center violated Section 8(a)(1) and (5) of the Act by its May removal of the job classification of Public Information Specialist and the employee so classified from the bargaining unit and coverage of the currently effective collective-bargaining agreement between

<sup>1</sup> Read 1981 after all further date references omitting the year.

the Center and the Union without prior notice to or bargaining with the Union, and without the Union's consent.

The Center responded with the following contentions: (1) the February interview was conducted for the purpose of informing the employee in question of the nature of a disciplinary penalty against her and therefore the Center did not violate the Act by denying her request for union representation during the interview; and (2) the job classification of Public Information Specialist (and the employee so classified) was a supervisory position, was not in the unit, and was erroneously listed in the agreement until the error was discovered, at which time it was removed therefrom, and therefore the Center did not violate the Act by the removal.

The issues for determination are (1) whether the employee interviewed in February reasonably believed the interview could or would result in disciplinary action against her, or was it limited to announcement of discipline previously decided upon; (2) whether the classification of Public Information Specialist and the employee so classified was included within the unit represented by the Union and covered by the Center-Union agreement; and (3) if so, whether the Center violated the Act by unilaterally removing the classification and the employee so classified from unit and contract coverage without first proposing such removal to the Union, bargaining with the Union over the proposed removal, and securing the Union's consent thereto.

The parties appeared by counsel at the hearing and were afforded full opportunity to adduce evidence, examine and cross-examine witnesses, argue, and file briefs. Counsel for the General Counsel and counsel for the Center submitted briefs.

Based upon my review of the entire record, observation of the witnesses, perusal of the briefs, and research, I enter the following:

## FINDINGS OF FACT

### I. JURISDICTION AND LABOR ORGANIZATION

The complaint alleges, the answer admits, and I find that at all pertinent times the Center was an employer engaged in commerce in a business affecting commerce and the Union was a labor organization within the meaning of Section 2(6) and (7) of the Act.

### II. THE ALLEGED UNFAIR LABOR PRACTICES

#### A. *The Alleged Disciplinary Interview*

It is undisputed that in early February and again on February 13 a senior accountant employed by the Center, Nezim Azar,<sup>2</sup> called payroll clerk Martha Gallardo into his office and interviewed her. At the earlier interview, Azar accused Gallardo of furnishing confidential information concerning the reclassification of an employee to other employees, which Gallardo denied, and criticized the method Gallardo followed in making com-

putations for an employee's paycheck, which Gallardo justified as the method she was instructed to use by Louis Bernardy, Azar's superior. In the course of this interview Gallardo did not request union representation; it is not alleged Azar's conduct at this interview violated the Act.

Gallardo was summoned to the second interview by her immediate supervisor, Mariano Salmeron, and was accompanied by Salmeron to Azar's office. When she arrived, Azar informed Gallardo he had written up the job deficiencies he discussed with her during the earlier interview, presented her with a document dated February 10 addressed to her by Azar entitled "Disciplinary Action," which recited her alleged dissemination of confidential information concerning an employee reclassification to other employees, alleged inaccurate and negligent tabulation of gross rate tabulations and deductions for payroll purposes, and alleged chronic tardiness, closing with the statement Gallardo might be discharged if her performance did not improve. Azar asked Gallardo to sign the document. Gallardo asked if the document was a reprimand. Azar replied it was. Gallardo said in that case she wanted union representation.<sup>3</sup> Azar denied her request, stating union representation was unnecessary since the document was a reprimand, not a grievance. Gallardo replied she knew it was a reprimand, that is why she wanted union representation. Azar again denied her request, stating if he was conducting a grievance meeting she would be entitled to union representation, but, since he was not conducting a grievance meeting, she was not entitled to union representation. Gallardo requested a copy of the reprimand. Azar refused to supply her one. Azar then stated he could have added to the reprimand Gallardo's misconduct in overpaying one of her friends, Stacy Epps, 2 days of sick leave despite Salmeron's instructions to refrain from making such payments in the absence of a medical slip. Gallardo denied Salmeron ever instructed her to withhold sick leave payments unless a medical slip was provided by the employee involved, and stated she never would make an improper payment due to her friendship with another employee. Azar turned to Salmeron and asked him if he instructed Gallardo to refrain from authorizing sick leave payments in the absence of a medical slip. Salmeron, corroborating Gallardo, conceded he never issued such an instruction to Gallardo. The meeting then concluded.<sup>4</sup>

Had Azar limited his February 13 contact with Gallardo to distribution of the previously prepared written

<sup>2</sup> The complaint alleges, the answer admits, and I find that at all pertinent times Azar was a supervisor and agent of the Center acting on its behalf within the meaning of Sec. 2 of the Act.

<sup>3</sup> On August 16, 1979, the Board certified a majority of the Center's professional employees, including all psychiatrists, psychologists, psychiatric social workers II, psychiatric social workers, therapists, registered nurses, psychiatric nurses, social workers, program development specialists, vocational rehabilitation counselors, M.A. level specialists, and all nonprofessional employees, including all community workers, recreational therapists, liaison services specialists, medical caseworkers, emergency services specialists, psychiatric technicians, maintenance workers, secretaries, receptionists, medical clerks, MIS clerks, medical billing clerks, bookkeepers and accounting clerks employed by the Center designated the Union as their exclusive representative for collective-bargaining purposes, excluding guards, supervisors and all other employees (Case 21-RC-15887).

<sup>4</sup> These findings are based upon Gallardo's uncontradicted testimony and partial corroboration by Salmeron. Azar did not testify.

reprimand, his action would not have constituted an unfair labor practice.<sup>5</sup> However, Azar did not so limit himself; instead, he launched into a discussion of a new and separate set of charges which elicited a defense from Gallardo and added questioning of Salmeron, an exchange which took place *after* Gallardo twice, in reasonable apprehension of further discipline, requested union representation. Clearly, this exchange violated Section 8(a)(1) of the Act, and I so find and conclude.<sup>6</sup>

*B. The Alleged Removal of the Public Information Specialist Classification and Incumbent From Unit and Contract Coverage*

As noted above, on August 16, 1979, the Board certified the Union as the exclusive collective-bargaining representative of a unit of the Center's employees. In the collective-bargaining agreement subsequently negotiated by the Center and the Union, the Center recognized the Union as the exclusive collective-bargaining representative "for all permanent employees of the Employer located at 972 S. Goodrich Blvd., Los Angeles, California 90022, hereinafter referred to as 'employees', for the unit certified in NLRB case number 21-RC-15887, excluding guards, supervisors, confidential employees, physicians and part time employees who work less than 20 hours per week." The agreement further provided for agreement coverage of new classifications created to perform work "within the parameters of work performed by classifications covered by this Agreement." (Art. XVII A.) Three appendices made part of the agreement list the classification of "Public Information Specialist" at rate ranges of \$1,230-\$1,372 per month, effective March 1, 1980; \$1,299-\$1,449, effective March 1, 1981; and \$1,372-\$1,531, effective March 1, 1982.<sup>7</sup>

Between the August 1979 certification of the Union and the negotiations of the agreement, employee Kathy Ledesma Flores was assigned to and performed the following job duties: drafting, arranging for the printing and distributing of two newsletters aimed at different audiences; drafting, causing the printing of, and distributing brochures describing the services, etc., offered by the Center; drafting, duplicating, and distributing press releases concerning the Center; drafting, duplicating, and securing the airing of spot announcements on radio and TV; preparing and distributing posters concerning the Center's functions and activities for display in appropriate locations; preparing and exhibiting audio-visual displays at community and health agency meetings and functions; etc. In addition, Flores designed and implemented referral systems with other organizations in the health field (alcoholic rehabilitation, etc.) and developed

and maintained liaison with such other organizations.<sup>8</sup> In the period immediately prior to her ceasing work to join in the strike (in March 1980), Flores issued a report to the Center's executive director, Claude Martinez, titling herself "Public Information Specialist," in accordance with an understanding reached by Ledesma Flores and Martinez in December 1979, when she returned from maternity leave, that, in view of a lessened need for use of the referral and liaison services she performed prior to going on maternity leave, she should devote her energies to the Center's public relations activities.

It is undisputed Flores voted in the 1979 election without challenge, that her position was considered by Flores, the Union, and the Center as included within the unit and coverage of the agreement,<sup>9</sup> and that the Center raised no question concerning its continued inclusion until May 1981.

The position remained vacant during the March-May 1980 strike period and thereafter until July 2, 1980.<sup>10</sup>

On July 2, 1980, the Center employed Frank Sifuentes as a "Public Information Specialist."<sup>11</sup> Sifuentes was hired at a starting salary of \$1,299, which is the third step rate<sup>12</sup> listed in the agreement for the classification of "Public Information Specialist," effective from March 1, 1980, through March 1, 1981. Sifuentes performed the job duties described above as performed by Flores prior to the strike. He was subsequently granted wage increases in accordance with the step-rate formula set out in the agreement.

Between July and November 1980, the five-six technicians and professionals in Sifuentes' department (Jose Navarro, the director; Mary Gonzalez Wiersma, the consultation and education coordinator; Genevieve Lopez, the mental health educator; a librarian unnamed in the record; and a volunteer coordinator unnamed in the record) were dependent on a single employee—Diane Sanchez—for clerical services. After repeated pleas for additional clerical support, another clerical employee was added in November (Sylvia Bringas). Bringas quit in December, and was replaced by Ms. Lourdes Meza.

Navarro subsequently secured his own secretary; Sanchez functioned primarily as Wiersma's secretary; and Meza divided most of her time between servicing Sifuentes and the librarian, with an occasional assist, as the need arose, to others in the department.

<sup>5</sup> These findings are based upon Flores' uncontradicted testimony, supported by documentation.

<sup>9</sup> As noted, Flores voted in the 1979 election without challenge and participated in the 1980 strike with no remonstrations from the Center that such participation was improper in that she was not within the unit; the agreement lists the classification "Public Information Specialist" in the three appendices thereto listing the various steps of the rate range for that classification at three effective dates; and the Center replied affirmatively to a formal inquiry from the Union concerning whether the incumbent in that position was within the unit and coverage of the agreement following the February 1981 execution of the agreement.

<sup>10</sup> Though both during this period and at a prior time another employee, Genevieve Lopez, who was classified as a "Mental Health Educator," performed some of the public relations functions heretofore described on behalf of the Center, in addition to her educational duties and functions.

<sup>11</sup> Though Sifuentes was interviewed and offered the job by Martinez during the strike, he refused to accept it until after the strike ended.

<sup>12</sup> Due to his prior experience.

<sup>6</sup> *Baton Rouge Water Works Company*, 246 NLRB 995 (1979).

<sup>7</sup> *N.L.R.B. v. J. Weingarten, Inc.*, 420 U.S. 251 (1975); *Materials Research Corp.*, 262 NLRB 1010 (1982).

<sup>8</sup> The agreement was not executed until February 1981, subsequent to a 7-week strike (between March and May 1980), during which time the Union took the position no final agreement had been reached between the Center and the Union, and subsequent to the filing by the Center of an unfair labor practice charge alleging the Union had violated the Act by refusing to execute the agreement, which was either dismissed or withdrawn upon the Union's February 1981 execution of the agreement in question.

After the Center-Union dispute was finally resolved by the Union's February 1981 execution of the agreement, the Union launched inquiries designed to ascertain the identity of the Center's employees within the unit and covered by the agreement to, *inter alia*, determine compliance with the union-security provision contained therein.<sup>13</sup>

In the course of its investigation, the Union learned Sifuentes was employed in the Public Information Specialist classification. On February 6, 1981, it wrote to the Center requesting the Center to verify that Sifuentes (and others named in the letter) was within the unit and coverage of the agreement. On February 18, 1981, the Center responded with a list of the employees within the unit and covered by the agreement, which included Sifuentes. The Union contacted Sifuentes; he joined the Union and executed a card authorizing the Center to deduct from his salary and remit to the Union his monthly dues, as authorized by the agreement.

On April 30, 1981, the Union forwarded the card signed by Sifuentes (along with cards signed by other employees) and requested the Center to commence deducting Sifuentes' union dues from his salary and remit the deducted sum to the Union.

On May 15, the Company replied with the statement Sifuentes was a supervisor, neither within the unit nor covered by the agreement, and stating, since Sifuentes was excluded from the unit and contract coverage, the Center would not honor the dues-deduction authorization.

The Union subsequently, both orally and in writing, protested the Center could not, unilaterally and without prior notice, bargaining, and agreement, remove a covered classification and its incumbent from the unit and contract coverage, and demanded the Center continue recognition of the Union as Sifuentes' exclusive representative for collective-bargaining purposes and continue coverage of Sifuentes' rates of pay, wages, hours, and working conditions under the agreement.

At all times since, the Center adhered to its position Sifuentes is neither within the unit nor covered by the agreement on the ground he is a supervisor.

The Center takes the position Sifuentes at times pertinent has been Meza's supervisor and therefore excluded from the unit and contract coverage, developing evidence that Meza primarily performs clerical functions for Sifuentes, that he recommended her hire, and that he evaluated her job performance.

It is undisputed that Sifuentes and his immediate supervisor, Wiersma, interviewed Meza and another employee when they were referred to them by the personnel department and that Wiersma passed on Sifuentes' favorable reaction to Meza, in which she concurred, to Novarro. It is likewise undisputed the majority of Meza's work consists of preparing smooth copies from Sifuentes' rough drafts and typing final copy after he had made the final corrections and revisions of those drafts. Sifuentes' "supervisory" functions, however, are limited to handing her his rough drafts, correcting and revising the smooth

copy, and approving the final version thereof; he did not grant her requests for time off, he did not hire her; he has never disciplined her; he has never processed any grievance she filed (she has never filed any); and he has never been told he had any power to discipline or discharge her, or to grant her requests for time off (when she made such requests he simply passed them on to Wiersma); and the single instance when he evaluated Meza's work performance, his evaluation was rejected by Wiersma and Novarro and he was directed to revise it to suit their desires, he was directed to make the evaluation by his superiors, and the evaluation took place after the Union had raised questions concerning his inclusion in the unit.<sup>14</sup>

On the basis of the above, I find at times pertinent Sifuentes was not a supervisor within the meaning of the Act and that, based upon his duties and the inclusion of the employee performing them within the voting unit and the agreement, at all pertinent times, Sifuentes was within the unit and the coverage of the agreement.<sup>15</sup>

I therefore conclude the Center violated Section 8(a)(1) and (5) of the Act by unilaterally removing the Public Relations Specialist classification and the employee therein from the unit and contract coverage without prior union notice, bargaining, and agreement.

#### CONCLUSIONS OF LAW

1. At all pertinent times the Center was an employer engaged in commerce in a business affecting commerce and the Union was a labor organization within the meaning of Section 2 of the Act.

2. The Center violated Section 8(a)(1) of the Act by denying Gallardo's February 13 request for union representation during an interview she reasonably believed could or would lead to discipline.

3. The Center violated Section 8(a)(1) and (5) of the Act by unilaterally removing the job classification of Public Information Specialist and the employee so classified from unit and contract coverage without prior union notice, bargaining, and consent.

4. The aforesaid unfair labor practices affect commerce as defined in the Act.

#### THE REMEDY

The General Counsel does not contend the issuance of the February 13 written reprimand to Gallardo violated the Act, only that his subsequent raising and discussion of another basis for discipline did so; and requested the

<sup>14</sup> These findings are based primarily on Sifuentes' testimony, substantially corroborated by Wiersma.

<sup>15</sup> The Center contends since the classification of "Public Information Specialist" is not specified in the certification issued by the Board, the incumbent employee therein is not within the unit. Such specificity is not required; the employee performing the duties of that classification (Flores) voted in the election and was recognized as a unit employee by both parties thereafter; the Center clearly has recognized the Union as the exclusive representative of other employees in a classification not specified in the certification; and the Center included the classification (and the employee therein) in the agreement; and the Act does not bar parties from including additional employee classifications and their incumbents under an agreement executed subsequent to the issuance of a certification, accreting such classifications and incumbents within the unit.

<sup>13</sup> There had been considerable employee turnover between the time the Union was certified, the parties' contract negotiations, the strike, and the execution of the agreement.

issuance of a simple cease-and-desist Order. I shall comply with that request, to forestall the Center's conduct of any further interviews without union presence threat after an employee who reasonably apprehends the interview could or would lead to discipline requests representation.

Insofar as the unlawful, unilateral removal of the Public Information Specialist classification and the employee so classified from unit and contract coverage is concerned, the appropriate Order is an instruction to

cease and desist from such removal without prior union notice, bargaining, and consent, and an affirmative direction to resume recognition of the Union as the exclusive collective-bargaining representative of employees in the classification in question until and unless the parties agree to the contrary, and to apply all the terms and conditions of the contract to the employee so classified until and unless the same condition occurs.

[Recommended Order omitted from publication.]